IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 49

HANS MAX HAUPT,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S MEMORANDUM IN REPLY TO BRIEF FOR THE UNITED STATES.

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Hans Max Haupt, respectfully shows unto the Court, that there are many inaccuracies contained in the Brief for the United States, as follows:

Inaccuracies in Government's Brief.

1. On Pages 2 and 3 of the Government's Brief is found a list of "Questions Presented." The list does not follow the outline of petitioner's list of "Questions Presented" on pages 4 to 6 of his petition for a Writ of Certiorari. The Government's list omits various questions of the petitioner, among them the following:

> "2. May evidence, which according to all decisions constitutes *circumstantial evidence*, be considered *direct evidence* for the purpose of satisfying the constitutional two-witness requirement, when a charge of treason is involved?
>
> 3. Did the Circuit Court of Appeals perform the functions of the jury in weighing the evidence as to each submitted overt act, for the purpose of overcoming the effect of Instructions Nos. 50 and 51, which required proof of *one* overt act only, and which were apparently erroneous in view of the general verdict rendered?
>
> 10. Was the petitioner deprived of a fair trial by reason of the constraint and exhaustion of the jury, resulting from twenty-eight hours of continuous deliberation without sleep and without accommodation for rest and sleep?
>
> 12. Can a general verdict of "guilty as charged in the indictment" sustain a conviction in the case at bar, in view of instructions Nos. 50 and 51, which are to the effect that a verdict of guilty may be rendered on basis of the commission of any one of the twelve submitted overt acts?
>
> 13. Did the Circuit Court of Appeals fail to apply the principles of law laid down by this Honorable Court in the case of *Cramer* v. *The United States*, 65 S. Ct. 918, requiring a reversal of the case at bar?"

2. On Page 17 of its brief, the Government states, as follows:

> "In the meantime, between 7:30 p.m. and 8:00 p.m., Gustave Zermer, a friend of petitioner's (R. 327-329), arrived at the Haupt apartment (R. 329). Shortly after he entered, Herbert and petitioner also entered together (R. 330). Mrs. Haupt had supper waiting for petitioner and Herbert, so Zermer remained in the parlor while the three Haupts ate in the kitchen (R. 331-332). Meanwhile Mrs. Saure (at that time Miss Melind, a friend of Herbert's) had also come to the Haupt apartment (R. 331). When the meal was completed Zermer joined the elder Haupts in the kitchen and Herbert joined Mrs. Saure in the parlor (R. 332). *Both Zermer and Mrs. Saure testified to these facts.*" (Italics supplied.)

The Government's statement that both Zermer and Mrs. Saure testified "to these facts," evidently is intended to convey the impression that Mrs. Saure also testified that the "three Haupts ate in the kitchen." However, Mrs. Saure testified that Herbert did not eat any food in the home of his parents.

A fair statment of facts will be found on Page 31 of Appellant's brief in the Circuit Court of Appeals, showing that on cross-examination, even Zermer had no personal knowledge of any of the Haupts eating in the kitchen.

The Government's statement that "both Zermer and Mrs. Saure testified to these facts," is misleading, as well as entirely wrong with reference to a material fact, namely, whether or not Herbert Haupt had food in the home of his parents.

3. At the end of Page 17 of the Government's brief, carrying over to Page 18, the Government maintains that Mrs. Kluczyk testified that "Herbert and Mrs. Haupt came

down the stairs from the Haupt apartment.". These words "from the Haupt apartment" are an addition made by the Government, which is not based on any testimony given by Mrs. Kluczyk.

4. On Page 18 of the Government's brief, it is stated that Agent Robe testified that Herbert drove away from the automobile agency with "a newly acquired" Pontiac automobile (R. 449). There was no testimony regarding "a newly acquired" Pontiac automobile.

The words "newly acquired" have been added by the Government attorneys in the brief.

5. On the same page, No. 18, again it is stated that FBI agents testified that Herbert Haupt drove away in his "newly acquired" Pontiac automobile (R. 446, 451, 466).

The testimony does not refer to a "newly acquired" Pontiac automobile, but merely to a "Pontiac automobile." These words "newly acquired" have evidently been added for the purpose of conveying the impression that the respective Pontiac automobile was identical with the Pontiac automobile purchased by his father at the Warner Motor Sales Company. However, nowhere does the record disclose that the Pontiac automobile used by Herbert Haupt has ever been identified with the Pontiac bought by his father.

On Page 21 of the Government's brief, we find the following statement:

> "The car was delivered to Herbert and he drove it away from the sales agency" (R. 449).

As a matter of fact, there is no testimony by any per-

son relating to delivery of a car to Herbert, and of Herbert's driving it away from the sales agency.

Immediately following, we find the statement that "Farrel's testimony *to this effect* was corroborated by that of Vinson, who testified that he saw petitioner and Herbert come in and that he received the money petitioner paid and the note which petitioner signed" (R. 315-316).

This statement is misleading as it creates the impression that Vinson corroborated all of the testimony of Farrell. This is not true. Vinson merely testified that he saw Hans and Herbert Haupt come into the sales agency on that particular evening, and that he did not speak to them at all on that day. Neither did Vinson speak about delivery of the car to Herbert as such testimony was never given by any person.

7. On Page 23 of the Government's brief, footnote No. 9, it is correctly stated from the *Department's records*, that Wergin and Froehling subsequently (*i. e.*, after reversal by the Circuit Court of Appeals of the verdict of guilty rendered November 14 1942, after a joint trial of all six defendants charged with treason, namely, Hans Haupt and his wife Erna, Otto Wergin and his wife Kate, and Walter Froehling and his wife Lucille) pleaded guilty to misprision of treason, in violation of Section 3 of the Criminal Code (18 U. S. C. 3) and each was sentenced to imprisonment for five years.

In order, however, that said footnote No. 9 of Government's brief, based on the *Department's records*, may not create an erroneous *setting* of the facts and circumstances, the following supplement may be in order. It is based on the *records of defendants' counsel*, to wit:

Pursuant to said verdict of November 14, 1942, and

judgments entered thereon, the defendants, Hans Haupt, Otto Wergin, and Walter Froehling were sentenced to death, and the defendants, Erna Haupt, Kate Wergin and Lucille Froehling, were each sentenced to imprisonment for a period of twenty-five years and a fine of ten thousand dollars.

Pending appeal to the United States Circuit Court of Appeals for the Seventh Circuit, all six defendants were held without bail. On June 29, 1943, said judgments were reversed and remanded by said Circuit Court of Appeals, principally on the grounds of the refusal of the trial judge to grant separate trials to each defendant, and upon the decision in *McNabb et al* v. *United States*, 318 U.S. 332. The Circuit Court of Appeals stated in its decision, reported in 136 Fed. 2d, 661:

> "Inasmuch as these judgments are to be reversed, there is no occasion to relate the evidence with a view of ascertaining its sufficiency to sustain the judgments. A study of the record, however, is convincing that it is not sufficient as to one and perhaps more of the defendants. This is so, even though it be assumed that the incriminating statements were properly admitted."

Subsequently motions were made in the trial Court, citing therein the afore-stated excerpt from the Opinion of the Circuit Court of Appeals, requesting that the defendants Kate Wergin and Lucille Froehling be released from custody upon bail in a nominal amount, or that an early date be fixed by the Court for the separate trials of these two defendants. This motion was resisted by the Government, and the trial of Hans Haupt and thereafter of Walter Froehling were ordered to precede the trials of any of the other four defendants. New indictments, charging treason, had been obtained against all six defendants.

The trial of Hans Haupt was had thereupon and a verdict of "Guilty as charged in the indictment," rendered on June 9, 1944. During all this time all of the defendants, including the three women defendants, were being held in the Cook County jail without bail, on the charge of treason.

Subsequent thereto, the Government approached the defendant's counsel and suggested a compromise of the remaining treason cases of said five defendants, to the effect that Walter Froehling and Otto Wergin plead guilty to misprision of treason, and that all charges against the three women defendants, Erna Haupt, Kate Wergin and Lucille Froehling, be dismissed without right of re-instatement thereof; that Erna Haupt consent to denaturalization.

This compromise was accepted and carried into effect on July 22, 1944. Thereupon, Wergin and Froehling pleaded guilty to misprision of treason to obtain the release of their wives from custody and further prosecution.

8. *On Page* 25 of the Government's brief, the Government states as follows:

> "The witnesses Majerczak (R. 519-564) and Hamby (R. 564-584) were confined in the Cook County, Illinois, jail at the same time that petitioner was there (R. 520, 566-567). Beginning on July 21, 1942, they talked with petitioner concerning his case and concerning their own cases (R. 521-524, 568). *They testified* that it was after petitioner learned from a newspaper that Herbert had been executed that he began talking of him and his activities. (R. 523-525, 568-569)."

Following this introduction, the Government refers to many statements appearing to have been made by Hans Haupt to both of them.

It is true that the testimony of these witnesses by means of reference numbers can be identified to have been given only by Majerczak, *or* by Hamby, and not by *both* of them. However, the Government's statement afore-mentioned that "they testified" will create an erroneous impression concerning very prejudicial data, to the effect that *both* of these persons testified to *all* of such data. There was no reason to consolidate the testimony of these two witnesses, which was substantially different in each case.

9. On Page 30 and at other places of the Government's brief, it is indicated that the indictment charges that petitioner assisted the agent in obtaining employment, whereas Overt Acts Nos. 10 and 11 merely charge "accompanying" as the overt act.

10. At the bottom of Page 47 of the Government's brief, carrying over to Page 48, the Government maintains that it was proven by the direct testimony of *two* witnesses that Hans Haupt made arrangements for buying an automobile *for his son, Herbert.*

This statement is absolutely incorrect. There were only two witnesses who testified regarding the automobile transaction, namely, Farrell and Vinson, and Vinsons specifically states that there had been no conversation in his presence by Hans Haupt to the effect that he was purchasing the car for his son. (See Petition for Writ of Certiorari, pages 28-30.)

11. On Page 89 of Government's brief, the Government mentions overt acts 13 to 16, whereof Nos. 13 and 15 merely charge "accompanying". The Government contends that there were two witnesses to the remaining overt acts 14 and 16.

Overt Act No. 14 charges the signing of a financial statement, an order of purchase, and making an initial payment toward the purchase of an automobile. This act was not proven by two witnesses. (See Appellant's Brief in Circuit Court of Appeals, page 180.)

Overt Act No. 16 charges that the defendant "did purchase said automobile for said enemy, Herbert Haupt". No part of Overt Act No. 16 was proven by the direct testimony of two witnesses. The second witness, Vinson, even stated specifically that there was no conversation as to whether it was a car for Hans or for someone else. (Petition for Writ of Certiorari, pages 28 to 30.)

12: On Page 91 of the Government's brief, the Government states that FBI agent Robe testified that he " 'saw Herbert Haupt leave the Warner Motor Sales, driving the 1941 Pontiac coupe' which had just been purchased (R. 449)", etc.

Reference to Abstract of Record page 449 does not show that Robe testified about a car "which had just been purchased." FBI agents did testify that Herbert left the Motor Agency, driving a Pontiac automobile, and that subsequent thereto Herbert Haupt drove a Pontiac. However, such Pontiac was never identified with the automobile bought by Hans. Agent Robe had no knowledge of and did not testify concerning Hans Haupt having purchased a Pontiac or any other type of automobile.

13. In numerous places, throughout the Government's brief, statements are made, either directly or indirectly, to the effect that certain facts are admitted or conceded, or that certain matters or facts are undisputed. To clear the record, let it be said by us that the petitioner admitted nothing, conceded nothing and disputed everything relat-

ing to the proof of his *alleged* guilt of treason. His plea was not guilty and counsel could not, and did not, waive any of his rights.

Moreover, we have steadfastly maintained that all of the alleged overt acts were either legally insufficient or were not proved by the testimony of two witnesses to the same act as required by the Constitution. It was not incumbent upon the defendant to disprove the charges in the indictment, though the Government's counsel seem to imply that, if the defendant did not offer evidence to disprove any charge in the indictment, the Government's evidence need not be examined closely for its sufficiency.

General Verdict and Instructions 50 and 51.

It was conceded, in the supplemental brief *entitled "Memorandum of Authorities"*, filed by the Government after oral argument in the Circuit Court of Appeals (Record 878-879) "that the failure to prove or the insufficiency of any of the submitted overt acts would require a reversal of the conviction."

And in the opinion of his honor, Judge Evans, of the Circuit Court of Appeals upon the appeal herein, 152 Fed. 2nd 771, at page 774, it is stated:

> "There may be overt acts of legal sufficiency and established by the direct testimony of two witnesses, but the conviction will fall if the Court submitted to the jury certain alleged overt acts which were charged in the indictment but which were either legally insufficient or not sufficiently established to present a jury question, by the direct testimony of two witnesses."

This is a necessary result of the general verdict in the case at bar and of the fact that the trial court, in instructions 50 and 51, instructed the jury to the effect that proof

of *any one* of the submitted overt acts would warrant a conviction of the defendant. It is not an error that may be waived by counsel failing to object to the forms of verdict submitted by the Court to the jury, nor even by defendant's counsel signifying approval of the forms of verdict.

Because of the fact that Instructions Nos. 50 and 51 (Record 39) were given to the jury and only a general verdict was returned without special findings as to the acts on which it rests, the principle stated in footnote No. 45 of the *Cramer* case applies *a fortiori* to the case at bar, viz:

> "The verdict in this case was a general one of guilty without special findings as to the acts on which it rests. Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient."

On the reasoning presented, we believe that instructions Nos. 50 and 51 (Record 39) constitute reversible error in view of the general verdict, if *any one* of the submitted overt acts was *legally insufficient* to constitute an act of treason.

It seems that the same conclusion should prevail in the event of *insufficient proof* as to *any one* of the submitted acts.

The defendant's demurrer to each of the acts charged in the indictment was overruled by the trial court. Defendant also moved, at the close of the Government's evidence, and again at the close of all of the evidence, for a directed verdict as to each separate act charged in the indictment, and was overruled by the Court. There can be

no question about the preservation of defendant's objections and exceptions with respect to these rulings.

Four of the submitted overt acts (Nos. 10, 11, 13 and 15) charge as the overt act merely the act of "accompanying". Although a traitorous intent is ascribed to each one of the four overt acts, nevertheless, the overt act in each case is nothing else *but accompanying.*

These four overt acts are legally insufficient under the rulings of this Honorable Court in the *Cramer* case.

Essentially, the same charge of *accompanying* (plus *conferring, treating* and *counselling with*) Werner Thiel, an enemy of the United States was made in Overt Act No. 2 of the *Cramer* case, as was made in our case in Overt Acts Nos. 10, 11, 13 and 15.

As in our case, Overt Act No. 2 in the *Cramer* case charges that the defendant's acts were done for the purpose and with the intent to give aid and comfort to the enemy, Werner Thiel. A comparison shows that Overt Act No. 2 in the *Cramer* case charged as much action and more than is charged against the defendant in the case at bar. Even though the proof in the *Cramer* case established all of the facts included in the Overt Act No. 2, this Honorable Court held that it was insufficient to support the judgment of conviction and reversed the case, without remanding it.

There are six harboring charges (viz: Overt Acts Nos. 12, 17, 20, 21, 22 and 23) all of which, except Overt Act No. 17, rested entirely upon circumstantial evidence instead of direct testimony by two witnesses and were clearly not proved as required by the Constitution. The remaining harboring act, No. 17, as proved, was legally insufficient because it merely showed by two witnesses that petitioner's

son, Herbert Haupt, the enemy, for the period of two hours on the evening of June 23, 1942, in the home of his parents, met the woman he was engaged to marry. He talked to her there. Using the language of the United States Supreme Court in the *Cramer* case, merely changing the name of the enemy, we say of this overt act:

> "And without the use of some imagination, it is difficult to perceive any advantage which this meeting afforded to Herbert Haupt, as an enemy, or how it strengthened Germany or weakened the United States in any way whatever."

We contend that this Overt Act No. 17 was not an act of treason.

There remain only Overt Acts Nos. 14 and 16, relating to the purchase of an automobile.

Overt Act No. 14 charged that defendant "signed a financial statement and an order for the purchase of an automobile, and made an initial payment" thereon, "with the intent and purpose of procuring an automobile for the said enemy, Herbert Haupt", etc.

We contend that Overt Act No. 14 was not proved by two witnesses.

On Number 14, there was only one direct witnesses to the signing of the financial statement and purchase order and the making of the down-payment by the defendant (Government witness Farrell). The other witness (Vinson) did not testify that he saw the defendant sign the papers or pay the deposit. He saw these items later. He was, however, introduced to the defendant and saw the defendant at the sales agency on that occasion.

For a more complete statement of the testimony bearing

upon this act, we refer to Appellant's Brief in the Circuit Court of Appeals, Pages 18 to 22.

Overt Act No. 16 charges specifically that an automobile was bought by petitioner *for the enemy, Herbert Haupt,* and as to this allegation, the following will show conclusively that only one witness testified that Hans Haupt bought the automobile for his son. That witness was the automobile salesman, Mr. Farrell. Mr. Vinson, the sales manager, the second witness, testified as follows:

Question of Mr. Finn: Just a minute, do you know who purchased the car?

A. Yes, Hans Haupt.

Q. And was there any conversation as to whether it was a car for Hans or for someone else?

A. No. (Record, page 312.)

We believe that we have shown that all of the submitted acts were either insufficient to constitute treason, or were not proved by two witnesses, as required by the Constitution. The insufficiency of, or failure of proof upon a single one of these acts is enough to require a reversal of this case.

We contend that the instruction to the jury, that only one overt act need be proven, to find the defendant guilty, was, in view of the general verdict, an assurance to the jury that each one of the submitted overt acts was legally sufficient. Accordingly the jury had a right to, and possibly did, select merely one overt act, not subject to much controversy among themselves, for the purpose of reaching the verdict of guilty. Perhaps it was overt act No. 10, charging that Hans Haupt accompanied Herbert to the home of Grunau.

All sources used to prove traitorous intent consisted of improperly admitted evidence.

For the purpose of proving traitorous intent, the Government submitted the following sources therefor, which we maintain were improperly admitted as evidence, to wit:

(a) Pre-war statements of the petitioner, some of which were made as much as six years prior to our entry into the war.

(b) Withdrawn overt acts.

(c) Alleged confessions or admissions of the petitioner made out of Court to FBI agents, Hirsch and Robe and to the convicts, Majerczak and Hamby, while the petitioner was in custody.

Not only was this improper evidence before the jury for their consideration ,but they were expressly instructed, with respect to each of these items of evidence, that the jury might consider such evidence in determining the issue of the intent of the defendant in commiting the overt acts submitted to the jury. Instructions 58 and 60 both charge the jury to consider the pre-war statements of the petitioner in determining the question of his treasonable intent upon the submitted overt acts.

Instruction No. 49 permits the jury to consider the withdrawn overt acts in determining the question of the intent of the defendant with respect to the submitted overt acts.

Instruction No. 61 charges the jury to consider the alleged admissions made by the defendant outside of Court, while he was in custody, in determining the question of the intent of the defendant with respect to the submitted overt acts.

These matters are more fully discussed on Pages 61-63 and 73-77 in the Petition for a Writ of Certiorari, herein. This evidence which we contend was highly improper and prejudicial to the defendant played a very important part in convicting the defendant.

We contend that admission in evidence of alleged out-of-Court confessions, or oral statements made by the defendant, violated the right of the accused, expressly set forth in the Constitution of the United States for his protection in a trial for treason.

The Constitution provides "No person shall be convicted of treason unless on * * * or on confession in open Court."

In our judgment, this provision absolutely prohibits the use of out-of-Court confessions to gain convictions for treason.

If such confessions can be used to prove traitorous intent, then they are being used to convict of treason.

Confusion of Jury (and of the United States Circuit Court of Appeals, and of the Government in the argument in Government's Brief), caused by unnecessary cumulative evidence, admitted for the sole purpose of proving the enemy status of Herbert Haupt, an important factor in the Jury's verdict of Guilty against HANS HAUPT.

Possibly one of the most damaging factors interfering with the right of the accused to a fair trial is found in the testimony and exhibits which were admitted, over objections duly made, for the sole purpose of proving the enemy status of Herbert Haupt.

Witness Burger, one of the saboteurs, was allowed to testify in great detail concerning a sabotage school in Germany, which he and Herbert Haupt attended; concerning the course of training, concerning exhibits, being instruments of sabotage, their construction, use and effect. He also testified regarding his trip from Germany to the United States in a submarine, although Herbert was not on such submarine. He further testified about oral conversations in Germany regarding instructions to Herbert Haupt and others concerning their mission in the United

States. Among these instructions to Herbert was the order to purchase an automobile to be used to facilitate carrying on sabotage, to obtain employment with the Simpson Optical Company, where Herbert had worked before going to Germany, to get information about the plant and the Norden bombsight, and not to see his parents upon his coming to the United States. (This last order is omitted from the Government's brief herein.) There were still more instructions.

Then there also was the witness, Leibl. He met Herbert Haupt, while he, Herbert, was in Germany, attending the sabotage school. Leibl, in his testimony, led by the Government's questions, mentioned the German Gestapo, the German Propaganda agency, and that Joseph Goebbels was the chief thereof, Lieutenant Kappe, Chief of the sabotage school, and that the first thing Herbert Haupt did, upon meeting Leibl, was to raise his hand, give a German salute, and say: "*Heil, Hitler.*"

Then there were various FBI agents who testified how and where they found various cases containing articles for sabotage, which were introduced in evidence by means of photographs or the actual objects; and how these detonators, incendiary bombs, blocks of TNT, etc., worked.

Time and again, it was particularly pointed out by the Government, when petitioner's counsel objected to this sort of testimony, *hearsay evidence,* that the Government offered it only to *serve to establish the enemy status of Herbert Haupt, and for no other purpose,* and it was admitted by the court subject to that condition, and then only on the grounds of *necessity for the Government* to prove the enemy status of Herbert Haupt.

However, this hearsay evidence, although so restricted,

was used to prove the traitorous intent of Hans Haupt, to wit:

More than one fifth of the entire Government's testimoney was taken up by these many details, offered merely to *prove the enemy status of Herbert Haupt,* and specifically *restricted* thereto. There was no need for such extensive testimony, as counsel for the accused had expressly admitted in his opening statement to the jury practically each material allegation testified to by these witnesses, for the purpose of precluding the introduction of cumulative evidence of this character, which would necessarily have the tendency of confusing the jury. (Abstract of Record 102 to 103)

We cannot state that it was the Government's intention to confuse the jury, but it is difficult, for instance, to understand why the Government brought in the testimony of Leibl, and sought and obtained by specifically directed questions, such answers as related to "Goebbels," "German Propaganda Agency," "German Gestapo," and of Herbert's German salute, by saying "Heil Hitler!"

We do not know how harmful this testimony was to a fair trial, but covering more than one fifth of the entire Government's testimony, it cannot have been without effect, beyond the mere point of proving Herbert's status as an enemy. It may be assumed that it confused the jury and that in some manner the jury looked upon this extensive testimony *as a source for traitorous intent of Hans Haupt,* instructions to the contrary notwithstanding.

Such assumption seems to be quite reasonable, if we find, as we do, that this extensive testimony confused in just such manner not only the United States Circuit Court of Appeals, but also the Government, in the preparation of

its brief herein. Both the Circuit Court of Appeals, as well as the Government, used this very testimony for the purpose of *proving a traitorous intent of Hans Haupt*, though it was restricted to proof of the *enemy status of Herbert Haupt*, viz:

The majority opinion in the United States Circuit Court of Appeals states on Page 790, 152 Fed. Reptr. Second Series, as follows:

> "It is defendant's argument that the purchase of the automobile was an innocent act in its entirety—the father had been using the son's Plymouth car during his absence, using it hard, and upon the son's return immediately went about to replace it with another car. While this explanation has plausibility, it does not comport with the *facts* actually disclosed. (Emphasis supplied.)
>
> One of the instructions Herbert received was to obtain a car to facilitate transportation of the explosives from the beach in Florida, for delivery to the various points of sabotage, and as a means of travel for the members of the expedition. The purchase of the car was arranged for within a couple of days of Herbert's return—showing urgency of his duty. The old Plymouth car had not become obsolete, in fact, it was used by the Haupt family during the week of surveillance. There would not have been the rush to buy the new car, without the pressing need for it."

We may notice that the Honorable Circuit Court of Appeals now refers to evidence restricted by offer of the Government and ruling of the trial court, to the enemy status of Herbert Haupt, as one of the "facts" in the case, for the purpose of proving a traitorous intent of Hans Haupt in connection with a submitted overt act.

The same error was committed by Government counsel, to wit: (Government brief, page 48:)

"The sufficiency of these acts as acts giving aid and comfort is even more sharply underscored; for Herbert had been instructed by his German superiors to get employment at the Optical Company and to get an automobile (supra, pp. 7-8). Here petitioner's acts of accompanying Herbert directly and substantially furthered the success of Herbert's sabotage mission."

(Government brief, pages 48 to 49:)

"And in their setting here the arrangements for and purchase of the automobile for Herbert were not only abstractly acts of aid and comfort, they assisted Herbert in carrying out the specific orders of his superiors in Germany, to procure an automobile for the use of his fellow saboteurs, "to remove our explosives from the place where they were * * * hidden," and "to give us range for our operations" (R. 115, 116). It is difficult to think of anything that petitioner could have done for Herbert during those first few days after his return to Chicago that added more to the success of the saboteurs' mission than just precisely this purchase of an automobile."

(Government brief, pages 49 to 50:)

"Similarly, while assisting an enemy spy to obtain employment of any kind is normally an act of aid and comfort to him, since it enables him to mingle without suspicion with the population and thus to conceal his identity, petitioner's acts here which asissted Herbert to get employment showed, when considered in their setting, more than just such generalized help. For Herbert had been specifically directed to get particular employment, with the Simpson Optical Co., for two reasons: first, to get information about the Norden bombsight which was being manufactured there, and second, to get information about the plant so that it could be more effectually blown up (R. 115, 120, 159, 160). Consequently, in this instance also, petitioner's acts were directly contributing to the success of Herbert's mission as that mission had been prescribed by the sabotage school in Germany."

(Government brief, pages 151:)

> "It was, of course, an essential part of the Government's case to prove that Herbert was an enemy agent who was in this country for the purpose of performing a hostile mission. The nature of the mission was the setting in which, under the *Cramer* decision, the overt acts performed by petitioner had to be judged. And the character of the mission was a vital element in determining, not only petitioner's guilt, but the gravity of his offense in giving aid and comfort to the enemy."

The foregoing certainly proves that evidence *restricted to solely prove the enemy status of Herbert Haupt*, admittedly *hearsay* evidence, was used by the Circuit Court of Appeals and by the Government to *prove a traitorous intent of Hans Haupt* in connection with submitted overt acts. Can we assume, that the jury was better able to overcome the confusing effect of this extensive testimony, in a trial lasting almost three weeks? We contend that the admission of such amount of cumulative hearsay evidence, to prove one single point, denied the accused the right to a fair trial, and *that a traitorous intent was found by the jury from evidence, which was inadmissible for such purpose.*

In connection with the foregoing, it may be noted that the defendant was refused the benefit of an instruction (No. D-8) informing the jury of the fact that Burger had been convicted of a felony and that this fact should be considered by the jury upon the matter of his credibility as a witness. The refusal to give this instruction for the defendant is also assigned as error.

Errors in Instructions Concerning Intent.

The submitted overt acts in themselves are of harmless nature, and there was nothing in the actions of petitioner, while his son was in Chicago, after his return from Germany, to show that any one of such acts was performed with any other intent than is dictated by paternal love towards an only child. Let us assume that Hans Haupt knew or vaguely guessed that his son had been sent here by Germany on an unlawful errand. Is it not natural for a father and a mother to desire their son to abandon everything that would be unlawful? Is it not natural for parents to see their son work instead of idle? Is it not natural for parents to purchase for their son an automobile in which to go to work, and for pleasure, particularly where the son had an automobile which had in the meantime been put to hard use by the father, as a painter's truck?

Who is there to say *beyond a reasonable doubt*, that any of such acts (even if charged and properly proven) were committed by petitioner with a traitorous intent?

We contend that instruction No. 37 (Record 35) of the charge to the jury correctly states the law with reference to the overt acts, in view of the relationship of father and son. We also contend that instructions Nos. 53, 54, and 63 (Record 40, 42) constitute error. These last named three instructions practically cancel out instruction No. 37, and in effect state that whatever Hans Haupt did in his relationship towards his son, an enemy, must have been done with traitorous intent.

We submit that the testimony offered on behalf of the petitioner (Abstract of Record 597 to 651) shows that the accused was a man accustomed to daily hard toil, and that he continued to be engaged therein day after day, including

Sunday, while his son Herbert was in Chicago, up to the day of arrest of Herbert. There is nothing to show in that record that petitioner planned sabotage or traitorous acts. It showed his continuous devotion to his customary work, in discharge of his duty as a breadearner for his family.

As a matter of fact no criminal act was shown on the part of the petitioner. Only by ascribing a treasonable intent to every day acts of any parent toward his son, does the Government seek to make out a case of treason against the petitioner here.

CONCLUSION.

We have not mentioned other errors and points relied upon, which are set out in the Petition for Writ of Certiorari and in Appellant's brief filed in the Circuit Court of Appeals. We respectfully refer the Court to said petion and brief for a discussion of such matters, which petitioner prays may also be considered by this Honorable Court herein.

As in the *Cramer* case, we believe that this case should be reversed without remanding. The petitioner has been in custody without bail ever since his arrest in July, 1942. He is a sick, broken man, and rightly or not, he has suffered greatly for the sins of his son, Herbert.

Respectfully submitted,

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